In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-251

WILLIAM LEVINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the decision below that the 50 percent civil tax fraud penalty, imposed under Section 6653(b) of the Internal Revenue Code of 1954, is to be computed on the total understatement of his tax liabilities, rather than only on the portions of the total understatement attributable to the fraudulent omission of income.

Following an audit of F.M.P. Corporation's income tax returns for its taxable years ended January 31, 1957, January 31, 1958, and January 31, 1959, and of William Levinson's income tax return for 1957, the Commissioner of Internal Revenue made adjustments in certain items reported on these returns, which resulted in the assessment of additional taxes. (Levinson was the assignee of F.M.P.) Subsequently, F.M.P. filed amended returns for its tax-

able years 1957 through 1959 which reported some additional income. A further investigation by the Internal Revenue Service resulted in the determination that petitioner had fraudulently failed to report additional corporate and individual income for the years in question. The additional taxes and fraud penalties were assessed (Pet. App. A3).

Although petitioner acknowledges the correctness of the jury's finding that his underreporting of income was due to fraud (Pet. 4; Pet. App. A3), he claims that the 50 percent fraud penalty should be imposed only on the difference between his true tax liabilities and the tax shown on the original tax returns plus the first additional assessments arising from errors not attributable to fraud. Following the decision in *Papa* v. *Commissioner*, 464 F. 2d 150 (C.A. 2), the district court upheld the government's contention that the fraud penalty was equal to 50 percent of the entire deficiency assessment (Pet. App. A14). A divided court of appeals affirmed (Pet. App. A2-A12), and denied a petition for rehearing *en banc* (Pet. App. A13).

1. Section 6653(b) of the Code provides that "[i]f any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment." Section 6653(c) of the Code provides that the term "underpayment" means a deficiency as defined in Section 6211(a). In turn, Section 6211(a) defines "deficiency" as "the amount by which the tax imposed * * * exceeds the excess of–(1) the sum of (A) the amount shown as the tax by the taxpayer upon his [timely filed] return, * * * plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over – (2) the amount of rebates * * * made."

These provisions of the 1954 Code are recodifications of Sections 293(b) and 271(a) of the 1939 Code. Section 293 (b) of the 1939 Code, the language of which had remained substantially unchanged since its introduction in Section 250(b) of the Revenue Act of 1918, 40 Stat. 1083, provided that if any part of any deficiency is due to fraud with intent to evade tax, then "50 percentum of the total amount of the deficiency" shall be added to the tax liability for assessment and collection. Section 271(a) of the 1939 Code, the language of which had remained substantially unchanged since its introduction in Section 273 (1), Revenue Act of 1924, 43 Stat. 296, defined "deficiency" in essentially the same manner as is now found in Section 6211(a) of the 1954 Code, as the amount by which the total tax liability exceeds the total of all amounts previously assessed and/or paid.

The legislative history of these provisions shows that the civil tax fraud penalty was to be computed on "50 per cent of the tax understated" (H. Conf. Rep. No. 1037, 65th Cong., 3d Sess., p. 61) and that the definition of deficiency was not intended to change this basis for imposing the fraud penalty (H. Rep. No. 179, 68th Cong., 1st Sess., pp. 24-25; S. Rep. No. 398, 68th Cong., 1st Sess., pp. 30-31). As the Tax Court stated in *Wilson* v. *Commissioner*, 7 T.C. 395, 398--

> * * * [S]ince the Revenue Act of 1918, the respondent [Commissioner] has consistently computed the penalty upon the total amount understated on the return and in every instance in those cases coming before us of which we are aware, we have approved the computation.

The decisions of the courts of appeals with respect to the 1939 Code fraud penalty provisions are uniformly to the same effect. See, *e.g., Romm* v. *Commissioner,* 245 F.2d 730 (C.A. 4); *George M. Still, Inc.* v. *Commissioner,* 19 T.C. 1072, 1076, affirmed *per curiam,* 218 F.2d 639 (C.A. 2); *Middleton* v. *Commissioner,* 200 F.2d 94 (C.A. 5). See also *Auerbach Shoe Co.* v. *Commissioner,* 21 T.C. 191, 194-195, affirmed, 216 F.2d 693 (C.A. 1); and 10 Mertens, *Law of Federal Income Taxation* (Rev.), §55.09.

The result should be the same under the 1954 Code. As the court below and the Second Circuit in *Papa* v. *Commissioner, supra,* recognized, Congress intended to make no change in the Commissioner's method of computing the fraud penalty when it carried forward Section 293(b) and 271(a) of the 1939 Code into Sections 6653(b) and 6211(a) of the 1954 Code. See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A405, A419; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 573, 591. The five decades of uniform judicial and administrative interpretations of statutes repeatedly re-enacted without substantial change, and the specific statements in the legislative history that the law was not changed in the 1954 Code, demonstrate that Congress has approved the Commissioner's method of computing the fraud penalty set forth in Treasury Regulations, Section 301.6653-1(c)(1)(i). See *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543-549; *United States* v. *Ryan,* 284 U.S. 167, 174-175; *National Lead Co.* v. *United States,* 252 U.S. 140, 145-146. See also *Commissioner* v. *South Texas Co.,* 333 U.S. 496, 501; *United States* v. *Correll,* 389 U.S. 299, 306-307.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.